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No. 85-247

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Lawrence Cranberg
Petitioner,

v.

Consumers Union of United States, Inc.
Respondent,

and

Lawrence Cranberg
Petitioner,

v.

Associated Press
and
Austin American-Statesman
Respondents

Reply Brief

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Whether the U.S. Court of Appeals for the Fifth Circuit was correct in giving its unqualified endorsement to the Anti-Fireplace Hoax (i.e., that a fireplace cools rather than heats an interior space in winter, and specifically that such is the effect of using Petitioner's appliance, the Texas Fireframe grate).

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"Constitutional law is something we all share, and the gaps between science, politics, and the law can be bridged only if we encourage everyone (to take part)".

Remarks of Justice Sandra Day O'Connor in Austin, Texas, reported in *Austin American-Statesman* for Sept. 16, 1985.

Introduction

With the onset of the energy crisis of the seventies, great attention was focused on the use of wood as an alternate to fossil fuels. There was a surge of innovation in the field of wood-burning appliances and at the same time the emergence of high-pressure methods to channel consumer demand to high-priced products. The most remarkable of those high-pressure methods was what plaintiff has called "The Anti-Fireplace Hoax"—the contention that the fireplace is energy counter-productive and should be replaced by a stove or fireplace insert.

The fireplace industry consists of many small producers, most of them with only rudimentary technical staffs, and it has fallen to the plaintiff in this case to become, in effect, the spokesman for the entire industry in exposing the Anti-Fireplace Hoax. The fact that he carries this heavy burden pro se is simply the result of the fact that when Consumers Union struck at his Texas Fireframe grate, it was in a very early stage of introduction into the market, and with the limited resources which had been accumulated, pro se was the only economically practicable means of litigating CU's libelous attacks. Thus, while pro se litigation usually is a reflection of narrow interests reflecting limited public concerns, the contrary is the case here, where circumstances have projected a lone scientist in the role of champion and defender of man's oldest invention still in general use in essentially its primitive form—the wood-burning fireplace, and involves the interests of millions of home owners and billions of dollars of annual consumer investment in appliances and in wood fuel.

It is therefore of utmost importance that this Petition by a pro se party not be brushed aside as an expression of petty interests by a lone eccentric, but that it receive deliberate attention commensurate with the vast public interests which are actually involved.

It has been a consistent feature of the strategy of the defense to focus attention on the pro se aspect of this litigation. Clearly, the intent has been to denigrate the importance of this action, and the strategy has been extremely effective in the two lower courts, where it has received only minimal attention. It is therefore no surprise that the defense, in its Opposition to this Petition, continues that strategy, belittling the plaintiff and his cause. But the neglect at the lower levels is precisely the cause of the errors at those levels, and calls for special attention by the U.S. Supreme Court to this Petition and Reply.

While Consumers Union has been the instigator of this action, and the other two defendants have been seemingly ensnared by its attempts to discredit the plaintiff by public attacks on his character, those other two defendants have been ardent seconds in this litigation, as the AP Opposition forcefully shows, where it carries the burden alone on several of the procedural issues raised in this litigation.

Not only have those defendants been ardent seconds in this litigation, but they proved to be ardent seconds in CU's attempts to becloud the scientific and technological questions involved by recourse to patently diversionary libels of their own invention: the physical struggle over a tape recorder, the allegations that the plaintiff withheld information on his complaints and that he sought to blackmail CU. It will surely impress the common-sense of the Court that these are transparently diversionary in intent, diversionary in effect, and can serve only one purpose other than the defamation of the plaintiff himself—namely, the need of CU to distract attention from its folly in embracing the Anti-Fireplace Hoax. The fact that the media generally have been the principal means by which that Hoax has been propagated for this past decade explains

the eagerness of AP and A-AS to discredit the plaintiff and to throw their weight behind CU.

It should be a particular concern of the U.S. Supreme Court that what is involved is much more than "saving face" by media acting in concert in accordance with the "unwritten laws" by which colleagues protect each other. What is involved is the continuing concealment by the media of facts about the consequences of the Anti-Fireplace Hoax which have direct effects of the first magnitude on public health and safety.

Thanks to media promotion of the Anti-Fireplace Hoax, there are ten million wood-stoves in American homes, which according to a leading trade journal (R102) and to the cognizant federal agencies are so many "time bombs" waiting to ignite chimney fires, and which spew dangerous pollutants into the atmosphere. What is fundamentally at issue in this case is the resolve of the media to conceal the Anti-Fireplace Hoax and their promotion of it as the key to the high-pressure selling and distribution of one of the most dangerous products ever to penetrate American homes on a large scale.

Surely there are few more effective means of bringing the foregoing facts to public attention than the granting of this Petition, and a proper trial of the issues in these cases.

I. Cranberg v. Consumers Union of the United States, Inc.

The following responses are entered in reply to the Opposition to Petitioner's Writ of Certiorari, the numbers below referring to like-numbered sections of said Opposition.

1. Respondent's claim that "the breadth of discretion is greater where there is a bench trial where one of the parties is pro se" is not supported by the case cited. *Ruiz v. Estelle* is *not* a pro se case.

Although Dr. Cranberg took the stand twice, he was never permitted to testify freely but was under constant interrogation and harassment by the court, which accounted for 23% of the transcript record. The fact that no cross-examination of Dr. Cranberg's testimony by opposing counsel ever took place speaks to the character of the proceedings.

The suspension of the Rules of Evidence barring hearsay has no precedent or justification in any case cited or in the Rules themselves, which nowhere make special provision for pro se parties. The attempt by respondents to insinuate such a provision is an intolerable abridgment of due process which should be stopped in its tracks.

The statement that "every document he sought to introduce was received into evidence" merely means that the Court, which never entered findings of fact or law and never cited any documents in its findings, did nothing more than attach a sticker to a document and declare it "entered." And even this empty ceremony was dispensed with so far as the supplementary exhibits were concerned. These were submitted by both sides and thereafter sank without a trace in any court finding or even in the official list of court Exhibits.

So blatant was the prejudice of the judge that the plaintiff was forced to say near the end of the first day (Tr. 1-249) "I beg you not to prejudge this matter."

2. Petitioner never waived his objections to the procedures used by the district court. Those procedures were inherently misleading and contradictory. Thus the court

gained petitioner's agreement to allowing the defendant Consumers Union to put on its case first by stating that its report "does in fact disparage the Texas Fireframe" (Tr. 1-37), and then proposed to call CU's "engineers" to substantiate their disparagement. But at the conclusion of trial, the court found that CU's report was not disparaging but that it was so favorable to plaintiff that "you can take this article (the CU report) and go forth to the world, and claim that Consumer's Union supports your grate" (Tr. 2-282). Thus a prima facie case of libel was turned on its head and no orderly trial of the issues ever took place.

There being no expert witnesses for the defense and no bar to admission of hearsay, the court's decisions were merely a set of personal opinions with no standing in law. The Court's opinions on the meaningfulness of CU's tests, for example, were purely judicial testimony (Tr. 2-273-274). The same is true at Tr. 2-37, where the court asks "Is it true or false? You are not going to prove it is false by this witness." The latter words were uttered after a fatal concession by CU's witness falsifying CU's report that the Texas Fireframe was a "loser." Under Federal Rule of Evidence 605 ,objection need not have been taken, but strong exception was in fact taken.

With a judge acting as his own jury, advocate and expert witness, delivering interim pronouncements on testimony which had no relationship to that testimony, the proceeding was an embarassing travesty of due process and could not end soon enough so far as plaintiff was concerned. Plaintiff's complaint is not that there was "only" a two-day "trial," but that there was no trial at all in any operationally meaningful sense of that term.

3. The Court of Appeals did not merely uphold the lower court. Where the lower court was obviously distressed by the inadequacy of CU's tests and sought to shore up its findings by finding no malice, the Court of Appeals performed an effective de novo evaluation of the evidence and concluded that CU's report was correct. Thus the Court of Appeals effectively supplanted the lower court as

fact-finder and reached a materially different conclusion on the critical question of the efficacy of fireplaces as heat sources. The Court of Appeals had no warrant for such a usurpation of the powers of the lower court. This case accordingly differs from *Bose v. Consumers Union*, where de novo review dealt with a determination which affected the outcome on a constitutional question.

Here the Court of Appeals was effectively trying to keep the question of malice and *New York Times Sullivan* from being carried forward, but instead those questions remain and there is in addition an appealable question of unwarranted encroachment on the fact-finding power of the lower court.

CU's contention that there was a "trial" is on a par with its claim that the fireplace is effectively a refrigerator of an interior space in cold weather—a contention more absurd than that the earth is flat or that it is the center of the universe, since the latter two statements can be reconciled with simple-minded observation but CU's findings cannot be so reconciled. Even man's household animals recognize that absurdity by warming themselves at the fireside in cold weather. The fact that CU's contentions have passed muster with two lower levels of the federal judiciary will stand as a permanent embarrassment to our federal courts which can only be extenuated by reversal or remand.

II. Cranberg v. Associated Press

Comparison of AP reporter Sullivan's story of 18 sentences with plaintiff's "Encounter with Consumers Union" (R3, R43) will fix in the mind of the reader the meaning of the lower courts when they held his story to be "fair and accurate." That is an opinion which should have been testified to by expert witnesses, and although one was in the trial courtroom, he was never called. The need was filled by the presiding judge, who was a self-constituted expert on heat transfer, combustion, and journalism, Rule 605 Federal Rules of Evidence, notwithstanding.

The obvious interpretation of Sullivan's performance is that the "young man," who had been with AP only two months when he wrote his story at the direction of AP's New York headquarters, was under instructions to obliterate what Dr. Cranberg had to say. But the lower court refused, despite *Herbert v. Lando*, to permit any investigation into those instructions, just as it refused to permit any investigation into the Sullivan-Berliner meeting at AP's Baltimore headquarters, and just as it refused to permit any discovery of any investigations AP's New York and Baltimore offices must have made in response to Dr. Cranberg's immediate and vociferous complaints about Sullivan's story. The right to discovery of complaint reviews has been firmly established by *Federal Trade Comm. v. TRW, Inc.*, which had been cited in pre-trial briefs to no avail. Their being withheld is an act of conspiracy with the approval of the lower courts.

The two basic elements of defense strategy in this case have been to obstruct discovery and to establish that the plaintiff is a "public figure." Three Motions for Summary Judgment and a Motion for Interlocutory Appeal under Rule 1292(b) failed to achieve their immediate objective, but the lower court eventually did make the plaintiff a public figure. Yet now AP characterizes as "tortured" the raising of the public figure question in this Petition!

Clearly, what is "torturing" to AP is the possibility that their tactics have backfired, and that with evidence of a

shift in Supreme Court opinion with respect to *New York Times v. Sullivan*, they may have set the stage for the reversal of that decision. No doubt the Court will soon relieve AP of its agony.

Few more suitable occasions for review of *New York Times v. Sullivan* could be presented to the Court. The substantive issues of public health and safety are of first magnitude, and the culpability of the media could hardly be more evident. AP's defiance of the above-cited discovery precedents and its defiance of Rules 26(b)(2) and 37(g) speak to the arrogance of power which has afflicted our media since *New York Times v. Sullivan.*

Media hoaxes are not new. See "Hoaxes," by C. J. MacDougall. Nor is superstition new to our media. See "Superstition and the Press" by C. J. MacDougall. But the continued flourishing of these absurdities in an age of science and reason is an anomaly which clearly points to the need for more critical media reporting and editing. And surely *New York Times v. Sullivan*, with its encouragement of "uninhibited, robust, and wide-open" news coverage was a signal in precisely the wrong direction, and a new direction is clearly called for.

III. Cranberg v. Austin American-Statesman

Of the 530 pages of trial transcript, just seven pages are devoted to the trial of the *Statesman* phase of the case. But the following will give some indication of what a proper trial would have brought out.

The *Statesman*, under previous, conservative, business-oriented management, had been a consistent source of strong media support for its home-town inventor and his work. The sudden turnabout marked by the CU story followed a transformation of management which put far-left elements in control of newspaper news and editorial policy. Testimony to that effect was produced in part (R101) and in part was precluded by obstruction of discovery. But the open facts are telling in themselves. The *Statesman* was the only newspaper in America that had a copy of Dr. Cranberg's paper when it ran the AP story. Yet it ran the story with the most defamatory headline used in any newspaper in America. And it omitted the one sentence of the AP story which reflected adversely on CU—namely, that its "Standard Fire" was inoperative. That such a story was ruled "fair and accurate" speaks to the state of our media and of some of our lower courts, and clearly calls for acceptance of this Petition.

Conclusion

The granting of this Petition for Writ of Certiorari is respectfully requested.

Respectfully submitted,

_____

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